

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CESAR AUGUSTO BURGOS MEDEIROS,) Case No. 2:16-cv-00877-JAD-NJK
Petitioner,) ORDER GRANTING *EX PARTE*
v.) PETITION
INTERNATIONAL GAME TECHNOLOGY,) (Docket No. 1)
Respondent.)

Pending before the Court is Petitioner's *ex parte* petition for an order pursuant to 28 U.S.C. § 1782 to conduct discovery for use in proceedings in Brazil. *See* Docket No. 1. The Court finds the pending petition properly resolved without oral argument. *See* Local Rule 78-2. For the reasons discussed more fully below, the petition is hereby **GRANTED**.

I. BACKGROUND

Petitioner is a defendant in a criminal action in Brazil, in which Petitioner is accused of possessing illegal gaming devices. *See* Docket No. 1-1 at 2. Six of the nine gaming devices at issue were manufactured by Respondent. *Id.* Petitioner is defending himself in the Brazilian prosecution on the basis that the devices were imported before they were declared illegal in Brazil in 1999, and that it is not illegal for him to continue possessing devices that were already in the country prior to 1999. *See id.* at 2-3.

Pending before the Court is Petitioner's request for an order authorizing the issuance of a subpoena pursuant to § 1782 seeking the production of documents from Respondent regarding the

1 manufacture and sale of the six gaming devices at issue. *See id.* at 5-12. To date, Respondent has
 2 refused to provide the documents sought, but has indicated that it would comply with a lawful subpoena
 3 requiring that it provide the information. *See id.* at 3.

4 **II. EX PARTE FILING OF PETITION**

5 As an initial matter, the Court notes that Petitioner seeks relief from the Court on an *ex parte*
 6 basis. *Ex parte* requests are disfavored and generally proper in only extremely limited situations in
 7 which compelling reasons have been established. *See, e.g., Maxson v. Mosaic Sales Solutions U.S.*
 8 *Operating Co.*, 2015 WL 4661981, *1 (D. Nev. July 29, 2015). Nonetheless, § 1782 petitions are
 9 frequently reviewed on an *ex parte* basis. *See In re Judicial Assistance Pursuant to 28 U.S.C. Sec. 1782*
 10 *ex rel. Macquarie Bank Ltd.*, 2014 WL 7706908, *1 (D. Nev. June 4, 2014) (“*Macquarie Bank I*”). The
 11 resulting order provides only that discovery is authorized, *see In re Letter of Request from Supreme*
 12 *Court of Hong Kong*, 138 F.R.D. 27, 32 n.6 (S.D.N.Y.1991), so concerns regarding any unfairness of
 13 granting the petition *ex parte* are alleviated by the fact that the opposing party may raise objections and
 14 exercise its due process rights by challenging the discovery after it is issued, *see In re Letters Rogatory*
 15 *from Tokyo Dist.*, 539 F.2d 1216, 1219 (9th Cir. 1976); *see also In re: O’Keefe*, 2015 WL 1308546, *2
 16 (D. Nev. Mar. 24, 2015) (recognizing that the subpoenaed party may move to quash the subpoena). In
 17 light of these safeguards, an *ex parte* application is a permissible method for seeking discovery pursuant
 18 to § 1782. *In re: Ex Parte Application Varian Med. Sys. Int’l AG*, 2016 WL 1161568, *2 (N.D. Cal.
 19 Mar. 24, 2016) (citing *Macquarie Bank I*, 2014 WL 7706908, at *1)).¹ Accordingly, the Court finds the
 20 pending petition properly decided on an *ex parte* basis.

21 **III. ANALYSIS**

22 Courts are authorized to issue orders pursuant to § 1782 once the enumerated statutory
 23 requirements have been satisfied. *See, e.g., Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79,
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25 ¹ To be clear, nothing herein should be construed as prohibiting Respondent from challenging either
 26 the ability of Petitioner to obtain discovery through § 1782 generally, or the scope of discovery that should
 27 be allowed. *See, e.g., In the Matter of a Petitioner for Judicial Assistance Pursuant to 28 U.S.C. Sec. 1782*
 28 *by Macquarie Bank Ltd.*, 2014 WL 3439103, *5 (D. Nev. May 28, 2015) (“*Macquarie Bank II*”) (holding
 that discovery was not proper pursuant to § 1782 in light of arguments presented by Respondent after service
 of subpoena), *objections overruled*, 2015 WL 7258483 (D. Nev. Nov. 17, 2015).

83-84 (2d Cir. 2004). Even where those statutory requirements have been satisfied, however, courts are
 2 not required to grant the § 1782 petition. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241,
 3 264 (2004). Instead, courts analyze several discretionary factors to determine whether the discovery
 4 sought should be allowed. *See id.* at 264-65.

5 The Court addresses the statutory requirements and discretionary factors in turn below.

6 A. STATUTORY REQUIREMENTS

7 Section 1782 provides in relevant part that:

8 The district court of the district in which a person resides or is found may order him to
 9 give his testimony or statement or to produce a document or other thing for use in a
 10 proceeding in a foreign or international tribunal, including criminal investigations
 11 conducted before formal accusation. The order may be made . . . upon the application of
 12 any interested person and may direct that the testimony or statement be given, or the
 13 document or other thing be produced, before a person appointed by the court.

14 28 U.S.C. § 1782(a). Pursuant to this statutory language, this Court is authorized to grant a § 1782
 15 application where a *prima facie* showing is made that (1) the person from whom discovery is sought
 16 resides or is found in this District, (2) the discovery is for use in a proceeding before a foreign or
 17 international tribunal, and (3) the application is made by a foreign or international tribunal or any
 18 interested person. *See In re Application of Ontario Principals' Council*, 2013 WL 6844545, *2 (E.D.
 19 Cal. Dec. 23, 2013) (quoting *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998)). Each of these statutory
 20 requirements is met in this case.

21 First, Petitioner has presented evidence that Respondent is headquartered in this District. *See*
 22 Docket No. 1-1 at 14. Second, the discovery is sought for use in a pending criminal proceeding in the
 23 Superior Tribunal de Justiça - Brazil. *See* Docket No. 1-1 at 2. Third, Petitioner is a party to the
 24 proceedings in Brazil as a criminal defendant, *see id.*, and therefore qualifies as an "interested person,"
 25 *see Intel*, 542 U.S. at 256. Accordingly, the Court finds the statutory requirements to grant § 1782 relief
 26 are satisfied.

27 B. DISCRETIONARY FACTORS

28 Courts are not required to grant a § 1782 application simply because the statutory requirements
 29 are met. *See Intel*, 542 U.S. at 264. The Court has broad discretion in deciding whether to grant
 30 discovery under § 1782. *Four Pillars Enterps. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th

1 Cir. 2002). The Supreme Court outlined the discretionary factors that district courts should consider
 2 when ruling on a § 1782 application:

- 3 (1) whether the material sought is within the foreign tribunal's jurisdictional
 reach and thus accessible absent Section 1782 aid;
- 4 (2) the nature of the foreign tribunal, the character of the proceedings underway
 abroad, and the receptivity of the foreign government or the court or agency
 abroad to U.S. federal-court jurisdictional assistance;
- 5 (3) whether the Section 1782 request conceals an attempt to circumvent foreign
 proof-gathering restrictions or other policies of a foreign country or the United
 States; and
- 6 (4) whether the subpoena contains unduly intrusive or burdensome requests.

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 10 *See, e.g., In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 563 (9th Cir.
 11 2011). These discretionary factors “involve overlapping considerations, are considered collectively by
 12 the court in exercising its discretion, and are not stand-alone categorical imperatives.” *Macquarie II*,
 13 2015 WL 3439103, at *4 (quoting *In Matter of Application of Action & Protection Foundation Daniel*
 14 *Bodnar*, 2014 WL 2795832, *5 (N.D. Cal. June 19, 2014)). Courts must exercise their discretion under
 15 § 1782 in light of the twin aims of the statute: providing efficient means of assistance to participants in
 16 international litigation in our federal courts and encouraging foreign countries by example to provide
 17 similar means of assistance to our courts. *See, e.g., Pott*, 945 F. Supp. 2d at 1199 (quoting *Schmitz*, 376
 18 F.3d at 84).

19 First, the Court analyzes whether the material sought is within the foreign tribunal's
 20 jurisdictional reach. Respondent is not a party to the underlying Brazilian criminal proceeding,
 21 rendering the need for assistance from this Court more readily apparent. *See In re Pimenta*, 942 F. Supp.
 22 2d 1282, 1288 (S.D. Fla. 2013) (allowing discovery from non-parties to Brazilian proceeding).

23 Second, the Court analyzes the nature of the foreign tribunal, the character of the proceedings
 24 underway abroad, and the receptivity of the foreign court. Here, the underlying proceedings are criminal
 25 in nature regarding Petitioner's compliance with Brazil's gaming laws, and Petitioner here seeks
 26 discovery to establish his complianc. There is no indication that the Brazilian court would be
 27 unreceptive to such discovery. *See Pimenta*, 942 F. Supp. 2d at 1288; *see also In re Application for an*
 28 *Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil*, 466 F. Supp. 2d

1 1020, 1031-32 (N.D. Ill. 2006) (rejecting argument that Brazilian Labor Court would be unreceptive to
 2 discovery obtained through § 1782 order).

3 Third, the Court analyzes whether the pending request is an attempt to circumvent foreign proof-
 4 gathering restrictions. Once again, there is no indication in the record currently that allowing discovery
 5 through the instant proceeding would circumvent proof-gathering restrictions. *See Labor Court of*
 6 *Brazil*, 466 F. Supp. 2d at 1031-32.

7 Fourth, the Court analyzes whether the subpoenas contain unduly intrusive or burdensome
 8 requests. The proper scope of discovery arising out of a § 1782 application is generally determined by
 9 the Federal Rules of Civil Procedure. *See, e.g., Government of Ghana v. ProEnergy Servs., LLC*, 677
 10 F.3d 340, 343 (8th Cir. 2012); *see also In re Letters Rogatory From Tokyo Dist. Prosecutor's Office*,
 11 16 F.3d 1016, 1019 (9th Cir. 1994) (unless the court order otherwise specifies, the Federal Rules of Civil
 12 Procedure apply).² In this instance, the discovery sought from Respondent is aimed at establishing
 13 Petitioner's compliance with Brazilian law; namely, it is aimed at establishing the manufacturing and
 14 chain of title of six of the gaming devices at issue in an attempt to establish that they were imported into
 15 Brazil prior to the 1999 law prohibiting such devices. Such discovery is within the scope of allowable
 16 discovery. *See Fed. R. Civ. P. 26(b)(1)*.

17 **III. CONCLUSION**

18 For the reasons discussed more fully above, Petitioner's *ex parte* petition for an order pursuant
 19 to 28 U.S.C. § 1782 is hereby **GRANTED**.

20 IT IS SO ORDERED.

21 DATED: April 21, 2016

22 
 23 NANCY J. KOPPE
 24 United States Magistrate Judge

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26 ² The Federal Rules of Civil Procedure have been applied even when the underlying foreign
 27 proceeding is criminal in nature. *See Application of Sumar*, 123 F.R.D. 467, 469-70 (S.D.N.Y. 1988); *see*
 28 *also Weber v. Finker*, 554 F.3d 1379, 1384 (11th Cir. 2009); *In re Ex Parte Application of Jommi*, 2013 WL
 6058201, *4 (N.D. Cal. Nov. 15, 2013).